Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd

HIGH COURT (IPOH) — CASE NO AA-22NCVC-66–05 OF 2016
HASHIM HAMZAH J
13 SEPTEMBER 2020

Contract — Conditional contract — Conditions precedent ('CPs') — Whether plaintiff breached contract with defendant for not fulfilling conditions precedent ('CPs') in contract within stipulated time — Whether plaintiff's fulfillment of CPs was nevertheless done within reasonable time although time limited for their completion had expired — Whether defendant's failure to complain or rescind contract when time limited for completion of CPs expired and its continued treatment of contract as subsisting rendered time no longer of essence of the contract — Whether defendant could no longer rely upon plaintiff's failure to fulfill CPs within original contractual timeframe as ground to terminate the contract

The plaintiff owned a piece of land which it agreed to sell to the defendant for RM17m pursuant to a sale and purchase agreement ('SPA') upon the signing of which the defendant paid the plaintiff a deposit of RM1.7m ('the deposit') and was given vacant possession of the land. The SPA was conditional upon the plaintiff's fulfillment of certain conditions precedent ('CPs') within six months of the date of the agreement. The agreement provided that the defendant's obligation to pay the balance purchase price only arose when the CPs had been fulfilled. The CPs required the plaintiff to furnish to the defendant various documents including the state authority's consent to the transfer of the land to the defendant, the certificate of fitness or certificate of completion and compliance and building plans, drawings and specifications relating to buildings on the land as well as manuals, handbooks, maintenance records and other relevant documents concerning the operation of machinery and equipment and fixtures and fittings on the land. A little more than two years after the date of the SPA, the defendant notified the plaintiff that it was terminating the SPA — on the ground the plaintiff had not fulfilled the CPs — and demanded for the refund of the deposit. In response, the plaintiff filed the instant suit for, inter alia, a declaration that it had fulfilled all the terms and conditions under the SPA, that the defendant's termination of the SPA was unlawful and that the plaintiff was entitled to forfeit the deposit on the defendant's failure to pay the balance purchase price. In its counterclaim, the defendant sought a declaration that its termination of the SPA was lawful and valid. It also prayed for the refund of the deposit and for damages.

Held, allowing the plaintiff's claim and dismissing the counterclaim:

(1) The evidence showed that the plaintiff had delivered all the documents required under the CPs in cl 2.1 of the contract to the defendant after the time stipulated for performance of the CPs under cl 2.1 had lapsed. The defendant did not exercise its right or take steps to rescind the contract immediately upon the expiry of the stipulated time. Instead, it repeatedly requested for due compliance without imposing any specific time limit. Time was therefore rendered at large and ceased to be of the essence of the contract even though the stipulated six months period had lapsed. In any case, the plaintiff had furnished the required documents to the defendant within reasonable time (see paras 24, 26 & 34).

(2) On balance of probabilities, the plaintiff had successfully shown that it had fulfilled all of the CPs under cl 2.1 of the contract. The contract was therefore no longer a conditional contract and had come into full force. The plaintiff had not committed any breach of the terms of the contract and there was no valid reason for the defendant to terminate the same. The termination was bad in law. Consequently, the plaintiff had the option to either accept the termination and sue for damages or reject the termination and treat the contract as subsisting. The plaintiff now sought declaratory orders that it had fulfilled all the terms under the contract and that the defendant had unlawfully terminated the contract. The court's answer to both of those prayers was in the affirmative (see paras 45, 52–53 & 55).

(3) The plaintiff was entitled to forfeit the deposit paid under the SPA. The defendant was not entitled to any damages under its counterclaim since it was the defendant which had unlawfully terminated the contract (see paras 60–61).

[Bahasa Malaysia summary

Plaintif memiliki sekeping tanah yang mana ia telah bersetuju untuk dijual kepada defendan dengan harga RM17 juta berdasarkan perjanjian jual beli ('SPA') setelah ditandatangani yang mana defendan telah membayar plaintif deposit sebanyak RM1.7 juta ('deposit tersebut') dan diberi milikan kosong bagi tanah tersebut. SPA adalah berdasarkan kepada syarat-syarat duluan ('CP') yang harus dipenuhi oleh plaintif dalam tempoh enam bulan dari tarikh perjanjian. Perjanjian tersebut menyatakan bahawa kewajiban defendan untuk membayar baki harga belian hanya akan timbul sekiranya CP telah dipenuhi. CP tersebut juga memerlukan plaintif untuk mengemukakan kepada defendan pelbagai dokumen termasuk persetujuan Pihak Berkuasa Negeri untuk pindah milik tanah tersebut kepada defendan, sijil layak menduduki atau perakuan siap dan pematuhan serta pelan bangunan, lukisan dan spesifikasi yang berkaitan dengan bangunan di tanah serta manual, buku panduan, rekod penyelenggaraan dan dokumen lain yang berkaitan dengan operasi jentera dan peralatan dan lekapan dan kelengkapan di atas tanah tersebut. Lebih kurang dua tahun dari tarikh SPA, defendan memaklumkan kepada plaintif bahawa

pihaknya akan menamatkan SPA — dengan alasan plaintif tidak memenuhi CP — dan menuntut pengembalian deposit. Sebagai balasan, plaintif memfailkan tuntutan semasa, antara lain, suatu deklarasi bahawa ia telah memenuhi kesemua terma dan syarat di bawah SPA, bahawa penamatan SPA oleh defendan adalah tidak sah dan bahawa plaintif berhak untuk melucuthak deposit atas kegagalan defendan untuk membayar baki harga belian. Melalui tuntutan balasnya, defendan memohon suatu deklarasi bahawa penamatan SPA adalah berdasarkan undang-undang dan sah. Ia juga memohon untuk deposit dikembalikan semula dan ganti rugi.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas:

(1) Keterangan menunjukkan bahwa plaintif telah menyerahkan kesemua dokumen yang diperlukan di bawah CP dalam klausa 2.1 kontrak tesebut kepada defendan setelah tempoh yang ditetapkan untuk pelaksanaan CP di bawah klausa 2.1 tamat. Defendan tidak melaksanakan haknya atau mengambil langkah-langkah untuk membatalkan kontrak dengan segera setelah tamat tempoh yang telah ditetapkan. Sebaliknya, ia berulang kali memohon pematuhan wajar tanpa menetapkan seberang tempoh masa. Tempoh masa oleh itu telah dilanjutkan dan tidak lagi menjadi inti pati kontrak walaupun tempoh enam bulan yang ditetapkan telah tamat. Oleh yang demikian, plaintif telah mengemukakan dokumen yang diperlukan kepada defendan dalam tempoh masa yang munasabah (lihat perenggan 24, 26 & 34).

(2) Berdasarkan imbangan kebarangkalian, plaintif telah berjaya menunjukkan bahawa ia telah memenuhi kesemua CP di bawah klausa 2.1 kontrak. Kontrak tersebut oleh itu bukan lagi kontrak bersyarat dan berkuatkuasa sepenuhnya. Plaintif tidak melakukan sebarang pelanggaran terma kontrak dan tidak ada alasan yang munasabah bagi defendan untuk menamatkannya. Penamatannya adalah tidak wajar dari segi undang-undang. Akibatnya, plaintif mempunyai pilihan untuk sama ada menerima penamatan dan menuntut ganti rugi atau menolak penamatan dan menganggap kontrak sebagai masih terpakai. Plaintif sekarang memohon perintah deklarasi bahawa ia telah memenuhi ksemua terma di bawah kontrak dan bahawa defendan telah menamatkan kontrak secara tidak sah. Dapatan mahkamah untuk kedua-dua permohona tersebut adalah diakui (lihat perenggan 45, 52–53 & 55).

(3) Plaintif berhak untuk melucuthak deposit yang telah dibayar di bawah SPA. Defendan tidak berhak mendapat sebarang ganti rugi di bawah tuntutan balasnya kerana defendan yang telah menamatkan kontrak secara tidak sah (lihat perenggan 60–61).]

Cases referred to

EON Bank Bhd v Hotel Flamingo and another case [2005] 1 MLJ 712; [2005] 5 CLJ 253, HC (refd)
Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd [2018] 5 MLJ 380; [2018] 9 CLJ 311, CA (refd)
Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65; [1999] 1 CLJ 89, CA (folld)
Invescor Sdn Bhd v Sobena Maju Sdn Bhd [2007] MLJU 653; [2008] 2 CLJ 561, CA (refd)
Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281; [2017] 4 CLJ 676, FC (refd)
LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor [2007] 4 MLJ 1; [2007] 2 CLJ 434, CA (refd)
Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169; [1998] 4 CLJ 352, CA (refd)
MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd [2010] 5 MLJ 71; [2010] 1 CLJ 36, CA (refd)
Morello Sdn Bhd v Jaques (international) Sdn Bhd [1995] 1 MLJ 577; [1995] 2 CLJ 23, FC (refd)
Nyap Kui Fah v Len On Contractor [1978] 1 MLJ 208; [1977] 1 LNS 9, FC (refd)
Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd [2020] 3 MLJ 704; [2020] 5 CLJ 472, CA (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253; [1939] 1 LNS 107 (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, HC (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4; [1978] 1 LNS 223 (refd)
Yeo Liong Ho v Loh Choon Hooi [2010] 1 MLJ 838; [2010] 2 CLJ 580, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103
Street, Drainage and Building Act 1974
Uniform Building By-Laws 1984

Hashim Hamzah J:

INTRODUCTION

[1] Briefly, the facts in the present case are as follows.

[2] The plaintiff is the registered proprietor over a piece of land known as Lot 15648 held under PN 336834, Mukim Lumut, Daerah Manjung, Negeri Perak ('the said land').

[3] The plaintiff and the defendant entered into a sale and purchase agreement on 16 June 2014 ('the said contract') where the defendant agreed to purchase and the plaintiff agreed to sell the said land for a total consideration of RM17m ('the purchase price').

[4] Upon execution of the said contract, the defendant haspaid RM1.7m to the plaintiff as a deposit. Vacant possession of the said land was given to the defendant free from rent or any charges.

[5] Dispute arose between the parties when the defendant alleged that the plaintiff has failed to fulfill its obligations under cl 2.1 of the said contract. This issue will be dealt with later throughout this judgment.

[6] The defendant claimed to have issued several reminders to the plaintiff to comply with cl 2.1 of the said contract but the plaintiff failed to do the same. Therefore, the defendant through a letter dated 6 April 2016 had terminated the said contract and demanded for the return of the deposit from the plaintiff.

[7] Dissatisfied, the plaintiff commenced this action on 20 June 2016. The plaintiff claimed for the following reliefs, and I quote:

> 24. OLEH ITU PLAINTIF MENUNTUT DARIPADA DEFENDAN:
>
> (1) Pelaksanaan spesifik Perjanjian Jual Beli bertarikh 16.06.2014 di antara Plaintif dengan Defendan;
>
> (2) Berikutan perintah dalam perenggan (1) di atas:-
>
> (a) Bahawa Defendan membayar Baki Harga Jualan tersebut berjumlah RM15,300,000.00 dalam masa satu (1) bulan dari tarikh perintah Mahkamah Yang Mulia ini; dan
>
> (b) Bahawa Defendan juga membayar faedah pada kadar 5% setahun atas Baki Harga Jualan tersebut berjumlah RM15,300,000.00 dari tarikh 22.6.2016 atau mana-mana tarikh yang diperintahkan oleh Mahkamah Yang Mulia ini sehingga tarikh penyelesaian penuh.
>
> (3) Secara alternatif kepada perenggan-perenggan (1) dan (2) di atas, bahawa Mahkamah Yang Mulia ini memberikan perintah-perintah seperti berikut:-
>
> (a) Satu deklarasi bahawa Plaintif telah memenuhi segala terma-terma dan syarat-syarat Perjanjian tersebut;
>
> (b) Satu deklarasi bahawa Defendan telah dengan tidak sah dan/atau secara salah menamatkan Perjanjian tersebut;

(c) Satu deklarasi bahawa Plaintif berhak melucuthakkan Deposit tersebut sebanyak RM1,700,000.00 yang tleah dibayar oleh Defendan kepada Plaintif mengikut Perjanjian tersebut;

(d) Defendan membayar kepada Plaintif mense profit sebanyak RM45,000.00 sebulan bermula daripada 1.5.2016 sehingga tarikh milikan kosong Hartanah tersebut dikembalikan kepada Plaintif;

(e) Milikan kosong Hartanah tersebut;

(f) Bahawa Kaveat Persendirian No. Perserahan (10773/2014) yang dimasukkan oleh Defendan di atas Hartanah tersebut ke atas keseluruhan bahagian yang dimiliki oleh Plaitif pada 23.7.2014 dibatalkan;

(g) Pendaftar Hakmilik Perak Darul Ridzuan dengan ini hendaklah sebaik sahaja disampaikan dengan perintah ini membatalkan kaveat tersebut;

(h) Bahawa gantirugi yang dialami oleh Plaintif akibat kemasukan kaveat tersebut oleh Defendan ditaksir oleh Penolong Kanan Pendaftar, dan gantirugi tersebut dibayar oleh Defendan kepada Plaintif;

(i) Bahawa Defendan membayar kepada Plaintif faedah sebanyak 5% setahun atas gantirugi yang telah ditaksir tersebut dikira dari tarikh pemfailan Writ sehingga tarikh penyelesaian penuh;

(4) Kos; dan

(5) Lain-lain perintah atau relif yang dianggap suaimanfaat oleh Mahkamah Yang Mulia ini.

[8] The defendant on the other hand, filed a counterclaim against the plaintiff, claiming for the following reliefs, and I quote:

34. Oleh itu, Defendan menuntut daripada Plaintif:

(a) Satu seklarasi bahawa penamatan Perjanjian bertarikh 16.06.2014 oleh Defendan melalui surat bertarikh 06.04.2016 adalah sah dan teratur;

(b) Jumlah wang deposit sebanyak RM1,700,000.00;

(c) Kos/perbelanjaan yang dialami oleh Defendan dalam jumlah RM86,939.00;

(d) Segala kehilangan dan kerugian yang dialami oleh Defendan untuk ditaksirkan oleh Pendaftar Mahkamah yang Mulia ini dan dibayar oleh Plaintif dengan serta merta;

(e) Faedah Pra penghakiman sebanyak 4% setiap tahun ke atas jumlah seperti di perenggan 34(b), (c) dan (d) dari tarikh 06.04.2016 sehingga tarikh penghakiman;

(f) Faedah selepas penghakiman sebanyak 5% ke atas jumlah seperti di perenggan 34(b),(c) dan (d) dari tarikh penghakiman sehingga tarikh penyelesaian;

(g) Kos;

A (h) Perintah dan/atau relif-relif lain yang dianggap suai dan manfaat oleh Mahkamah Yang Mulia ini.

[9] This matter went for full trial. Two witnesses gave evidence for the plaintiff and two witnesses gave evidence for the defendant. The list of witnesses who gave evidence are as follows:

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(a) Tan Choy Leet ('SP1');

(b) Mohd Rohaizan bin Abdul Aris ('SP2');

C (c) Vincent Das a/l Aruldas ('SD1'); and

(d) Mun Jing Kit ('SD2').

ISSUES TO BE TRIED

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[10] During the course of the trial, the learned counsel for the plaintiff submitted that the plaintiff would not be pursuing their claim for specific performance. Therefore, the main issues to be tried in the present case are as follows:

E (a) whether the plaintiff had failed to comply with the conditions precedent and its obligations under cl 2.1 of the said contract;

(b) whether the defendant was entitled to terminate the said contract and whether the termination of the said contract by the defendant was lawful; and

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(c) whether the plaintiff is entitled to forfeit the deposit paid by the defendant.

BURDEN OF PROOF

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[11] With regard to the burden of proof, it is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. When the burden shifts to the other party, it H can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. If the other party does not adduce any evidence when the burden has shifted to him, he will fail. If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. I In that event, it will not avail him to turn round and say that the defendant has not established his case.

[12] See ss 101–103 of the Evidence Act 1950 and these authorities *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4

CLJ 676 (FC), *Selvaduray v Chinniah* [1939] 1 MLJ 253; [1939] 1 LNS 107 (SC), *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; [1978] 1 LNS 223 (HC), *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147 (HC), and *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712; [2005] 5 CLJ 253 (HC).

[13] It is also trite that the standard of proof in civil cases is on the balance of probabilities (see *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 (FC)).

[14] Bearing in mind the trite position of the law as mentioned above, I now turn to consider the issues raised in the present case.

WHETHER THE PLAINTIFF HAS FAILED TO COMPLY WITH ITS OBLIGATIONS UNDER CLAUSE 2.1 OF THE SAID CONTRACT

[15] The issue on the fulfillment of cl 2.1 of the said contract is the crux of the dispute between the parties in the present case. For ease of reference, cl 2.1 of the said contract is hereby reproduced as follows:

> 2.1 Consent & Documents
>
> The Vendor shall at its own costs and expenses within six (6) months from the date of this Agreement (hereinafter referred to as the 'Approval Period') unless otherwise specifically waived or extended by the Purchaser in writing hereto shall irrevocably obtain or caused to be obtained:-
>
> (a) the ORIGINAL Consent to Transfer to transfer the said Property in favour of the Purchaser by the relevant authority of Perak;
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> (b) the ORIGINAL approvals, the valid and current certificate of fitness or certificate of completion & compliance, the building plans, the drawings/specifications to the buildings/structures on the said Property or copies thereof duly certified by the respective qualified party, the 'as-Built' plans including the Plans stated in Recital E not provided upon execution of this Agreement by the Vendor as stated in Recital E; and
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> (c) the ORIGINAL manuals, handbooks, maintenance records and/or guides and all other relevant documents in respect of the operations of all machinery and equipment and Fixture & Fittings in the said Property or copies thereof;
>
> wherein the date of receipt of the said Original Consent to Transfer and all the documents in relation to clause 2.1(b) and (c) by the Purchaser's Solicitors shall be referred to as the 'Fulfillment Date' wherein the parties agree that such Fulfillment at all material times notwithstanding the Vendor's early compliance with this clause 2.1, if applicable, shall not commence until at least two (2) months from the date of this Agreement.

[16] Under the said contract, the defendant is only required to pay the balance of the purchase price within six months from the fulfillment date. Clause 3.2 of the said contract provides as follows:

> The balance of the Purchase Price amounting to RINGGIT MALAYSIA FIFTEEN MILLION THREE HUNDRED THOUSAND (RM15,300,000.00) (hereinafter referred to as the 'Balance Sum') shall be paid to the Vendor's Solicitors as stakeholders within six (6) months from the Fulfillment Date (the last date herein shall hereinafter be referred to as the 'Completion Date').

[17] As stipulated under cl 2.1 of the said contract, the fulfillment date is the date of the receipt of all the documents in relation to cl 2.1(a), (b) and (c) of the said contract by the defendant's solicitors.

[18] Parties do not dispute that the said contract is a conditional contract which is subject to the fulfillment of cl 2.1 of the said contract as conditions precedent.

[19] The Court of Appeal in the case of *MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd* [2010] 5 MLJ 71; [2010] 1 CLJ 36 through the judgment of Abdul Malik Ishak JCA had succinctly clarify the operation of conditions precedent and conditional contract as follows:

> The Third Issue
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> [45] In answering this issue, I must highlight the following assertions:
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> (i) it is not in dispute that the SPA was a conditional agreement and it was subject to the conditions precedent as set out in para 'B' of the Second Schedule of the SPA;
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> (ii) it is a fact that all the conditions precedent have been fulfilled and this is evident from the defendant's own solicitors' letter dated 26 May 2006 wherein they confirmed the completion date to be on 25 August 2006 together with one month's extension to 25 September 2006;
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> (iii) the documents found at pp. 238 to 249 of 'ARJ1' demonstrate that all the conditions precedent have been satisfied; and
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> (iv) it is a fact that the defendant throughout the course of the proceeding did not dispute that all the conditions precedent had been fulfilled.
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> [46] *The operation of a contract may be subject to a condition precedent. And until the condition precedent occurs the contract is inoperative. A condition precedent may suspend entirely the formation of the contract or it may not delay formation itself but merely the operation of some, or all, of the obligations under the contract. In John Pym v Robert James Roy Campbell, James Thompson Mackenzie And Richard Pastor Pritchard* [1856] 6 EI & BI 379, for instance, the court held that *prior to the fulfilment of the condition there was no contract in existence*. In that case, the plaintiff wished to sell to the defendant a share in the invention of the plaintiff. A written document appeared to contain an agreement for the purchase. The plaintiff sought

to rely upon it but the defendant succeeded in establishing that the parties had further agreed that the written document was to be the agreement only if the plaintiff's invention was approved by a third party by the name of Abernethie. Unfortunately, Abernethie had not given his approval of the invention. The court held that there was no contract at all because Abernethie's approval was a condition precedent to the existence of the contract.

[47] The case of *Marks v Board And Another* [1930] 46 TLR 424 provides another example where no contract was found to exist because of a non-fulfilment of a condition. That was a case where there was a document labelled as a 'memorandum of agreement' which had been drawn up in relation to the sale of a house. That document carried the following words 'subject to survey'. The court held, on the facts, that there was no contract in existence.

[48] Put differently, an agreement subject to a condition precedent may impose some degree of obligation on both the parties or on one of them. And whether it has this effect or otherwise would depend on the degree of obligation that is imposed and it would also depend on the true construction of the term specifying the condition precedent (*Bentworth Finance Ltd v LubertAnd Another* [1968] 1 QB 680). A few examples of a condition precedent, in that context, will now be shown:

(i) in *Brown and Others v Knowsley Borough Council* [1986] IRLR 102 (where the appointment is said to 'last only as long as sufficient funds were provided' from specified sources);

(ii) in *Gyllenhammar & Partners International Ltd And Others v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep 403(where the contract is said to 'become null and void' if certain consents were not obtained); and

(iii) in *Jameson and another (executors of Jameson (decd)) v Central Electricity Generating Board (Babcock Energy Ltd, third party)* [1999] 1 All ER 193, 207 (where settlement of a tort claim become immediately binding but subject to implied resolutive condition that it was to become void if the agreed amount was not paid).

[49] *In the context of the present appeal, it is elementary that the completion date only crystallizes upon all the conditions precedent being met. Thus, once all the conditions precedent have been met, the SPA was no longer a conditional agreement. Rather, it was unconditional and had come into force.* (Emphasis added.)

[20] It is also important to note that once the conditions precedent have been fulfilled, the court had on several occasions ordered specific performance for parties to proceed with what has already been agreed in the contract.

[21] In the case of *Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd* [2018] 5 MLJ 380; [2018] 9 CLJ 311, ZalehaYusof JCA (now FCJ) in delivering the judgment of the Court of Appeal held as follows:

[32] In MMI Industries, supra, this court had stated that *our court has on several occasions ordered specific performance in cases of land transactions where there were conditions precedent to be fulfilled by the vendor*. In that case, this court allowed the

A appeal and granted the order for specific performance of the sale and purchase agreement which was conditional upon the approval of the State Authority of Johor.

[33] Based on those authorities, we were satisfied that a condition precedent in a contract such as in this instant case, is not an impediment for an order of specific performance to be granted. *It was merely a conditional contract which will no longer* B *be conditional if the conditions precedent have been fulfilled. The respondent herein was just seeking the appellant to comply and continue with the agreements and to apply for the State Authority's approval.* In the event the State Authority refuses to give its approval, the contract shall surely come to an end. (Emphasis added.)

C **[22]** The next question to be asked is whether the conditions precedent under the said contract have been fulfilled?

[23] First and foremost, according to cl 2.1 of the said contract, the plaintiff D is required to furnish all of the documents mentioned therein within six months from the date of the said contract. The time to comply with cl 2.1 of the said contract had already lapsed on 16 December 2014.

[24] Based on the evidence, the plaintiff had delivered all of the documents E required under cl 2.1 of the said contract to the defendant after the stipulated time under cl 2.1 of the said contract had lapsed. It can be seen that:

(a) the original consent to transfer from the State Authority dated 30 December 2014 was delivered to the plaintiff on 15 January 2015 (p F 60 Bundle C);

(b) the original documents required under cl 2.1(b) and (c) of the said Agreement has been delivered to the defendant on 25 September 2015 (pp 87–88 Bundle C); and

G (c) the plaintiff delivered another set of the original plans on 23 December 2015 in response to the defendant's solicitors' letter dated 9 March 2015 (pp 110 and 112 Bundle C).

[25] Furthermore, upon careful perusal of the correspondence between the H parties up until 14 January 2016, there was actually no evidence to show that the defendant had specifically waived or extended the time in writing as required under cl 2.1 of the said contract.

[26] Be that as it may, the defendant did not exercise its right or take positive I steps to rescind the said contract immediately upon the expiry of time thereof. Instead, the defendant had repeatedly requested for due compliance, without actually imposing any specific time limit.

[27] In the Court of Appeal case of *Yeo Liong Ho v Loh Choon Hooi* [2010] 1

MLJ 838; [2010] 2 CLJ 580, KN Segara JCA (as he then was) in delivering the judgment of the court held as follows:

> [15] The vendor failed to obtain the consent to transfer at the expiry of the extended consent period/completion date (21 August 1991) under the agreement. *However, the purchaser did not exercise his right to terminate the sale and purchase agreement and did not subsequently impose a time limit for the vendor to obtain the consent to transfer. In such circumstances, in law, we hold time was no more the essence of the contract for the completion of the sale and purchase agreement and, in particular, for the payment of the balance of the purchase price.* (Emphasis added.)

[28] It was also evident from the conduct of the partiesbased on the correspondence, that the parties were still in the midst of negotiation regarding the fulfillment of the plaintiff's obligation under cl 2.1 of the said contract even though the stipulated time had lapsed.

[29] In another Court of Appeal case of *Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169; [1998] 4 CLJ 352, it was held as follows:

> It is true that when time is of the essence of the contract and when the party who is in the right allows the time fixed for completion to pass and the parties go on negotiating, then time is no longer to be regarded as of the essence of the contract. See *Luck v White* [1973] 26 P & CR 89, 95, Goulding J said:
>
> > *The notice to complete expired early in September. The vendors did not then, as they had threatened, either rescind the contract or resell the property. Instead they continued to discuss the possibilities of completion and ultimately agreed to November 16. It would have been easy for the vendors to reserve their rights in express terms. They might, for example, have extended the period for compliance with the notice to a specified date, time to be of the essence in that regard. Indeed, the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect. The vendors, however, did nothing of the kind.*
>
> They encouraged the purchaser to try to complete notwithstanding the expiry of the notice, and there was nothing to tell him (that is, the purchaser) at what moment the axe would fall.
>
> The judge formulated the principle in this way, at 96:
>
> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstance. (Emphasis added.)

[30] However, it is also trite that in the event that time is no longer the essence of the contract and no time for performance is specified, the promise must be performed within a reasonable time.

[31] I am guided by the decision of the Court of Appeal in *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65; [1999] 1 CLJ 89 where NH Chan JCA (as he then was) held that:

> *When time is no longer of the essence of the contract and no time for performance is specified, the promise must be performed within a reasonable time*. Section 47 (of the Contracts Act 1950) reads:
>
> > Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. (Emphasis added.)

[32] In order to determine what amounts to a 'reasonable time', the law is trite that regards must be given to the overall circumstances of a particular case.

[33] Lee Hun Hoe CJ (Borneo) in delivering the judgment of the Federal Court in *Nyap Kui Fah v Len On Contractor* [1978] 1 MLJ 208; [1977] 1 LNS 9 held as follows:

> Where no time is set for the performance of the contract *the law implies that performance must be completed within a reasonable time having regard to the circumstances*. (Emphasis added.)

[34] Therefore, at the time when the required documents were served on the defendant, I find that time was at large and no longer of the essence even though the stipulated six months period had lapsed. However, based on the facts of the present case, I find that the required documents were still served within reasonable time to the plaintiff.

[35] The only extension of time in writing given by the defendant was by way of a letter dated 14 January 2016 (p 117 Bundle C) where the defendant had given six months therein (which expired on 14 July 2016) for the plaintiff to obtain a confirmation in writing from the local authority, Majlis Perbandaran Manjung ('MPM') and to obtain the amended certificate of fitness.

[36] Secondly, the defendant did not dispute the receipt of all of those documents. The defendant's contentions were primarily as follows:

(a) there were patent errors in the certificate of fitness dated 28 January 2007 ('CF') where:

(i) the CF only stated 'sebuah bangunan kilang 'steel fabrication' serta pejabat dua tingkat' but did not include a workshop which was also erected on the said land; and

(ii) the reference number of the approved building plan stated on the

CF was different from the reference number appearing on the approved plans furnished by the plaintiff to the defendant. A

(b) the defendant had repeatedly requested for the plaintiff to procure a new CF and furnished the same to the defendant but the plaintiff failed to do so; and B

(c) the original consent to transfer which was procured by the plaintiff and furnished to the defendant vide a letter dated 14 January 2015 had already lapsed on 30 December 2015.

[37] On this issue, I have gone through the evidence adduced during trial and found as follows. C

[38] On 20 November 2015, MPM had issued a clarification letter to the defendant ('the said clarification letter'), stating that: D

> Sehubungan degan itu, dimaklumkan bahawa Sijil Layak Menduduki tersebut dikeluarkan berdasarkan Borang E yang diterima dari Perunding C H Chuah Associates dan Bangunan yang terlibat adalah bangunan kilang 'Steel Fabrication' serta pejabat 2 *tingkat termasuk ruang 'workshop'*. (Emphasis added.)

E

[39] SP2 is a registered architect and also the head of the Building Department in MPM. According to SP2, his scope of work is to supervise every building applications to ensure that the statutory requirements under the Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984 are complied with. SP2 gave evidence as follows: F

(a) during cross-examination, SP2 confirmed that the word 'workshop' or 'steel fabrication workshop' was not mentioned in the CF:

> Rishwant: Perkataan workshop, steel fabrication workshop is not referred to in the jenis bangunan at page 1 bundle C. You don't see those words there. Sorry? You agree disagree? G
>
> Rohaizan: Setuju.

(b) however, SP2 also gave evidence during cross-examination that the said CF was issued in reference to the approved plan ie Plan No 07/03/212/2007/1. This basically means that the CF was issued to the buildings in the approved plan. It can be seen as follows: H

> Rishwant: Ya okay thank you. Can you please tell the court what is the purpose of apakah tujuan sesuatu perakuan kelayakan menduduki. Apakah tujuan?Purpose of such certificate. I
>
> Rohaizan: Tujuan perakuan tersebut adalah merangkumi perakuan daripada consultant ataupun perunding yang mengesahkan bangunan itu selamat dididuki termasuk dari segi aspek keselamatan teknikal agensi luar bomba elektrik dan air dan sebagainya dan bangunan tersebut adalah mengikut

kelulusan yang telah diluluskan oleh Majlis Perbandaran Manjung.

Rishwant: Dan jikalau sesuatu bangunan kalau ada tiga bangunan dalam kes ini kami menyatakan bahawa ada tiga bangunan atas tanah tersebut kalau kami menyatakan bahawa sijil perakuan ataupun perakuan kelayakan menduduki tersebut tidak merangkumi ketiga tiga bangunan tersebut adakah ianya menyalahi undang undang untuk anak guam kami untuk membuat business membuat perniagaan dia dalam salah satu daripada bangunan tersebut. Adakah dia menyalahi undang undang? Would it breach the law? The Strait and Building Act and the uniform building by laws.

Rohaizan: Maksudnya disini apabila CF itu dikeluarkan merujuk kepada pelan kelulusan pelan kelulusan itu kita rujuk semula bahawa bangunan bangunan yang dipinda ini di tapak tersebut adalah dilulus merujuk kepada pelan tersebut.

Rishwant: Ya dan jika perakuan kelayakan menduduki tersebut hanya merujuk kepada sebuah kilang steel fabrication serta pejabat dua tingkat dan tidak merujuk kepada bangunan yang lain adakah bangunan yang lain tersebut boleh diusahakan atau segala apa apa perusahaan atau perniagaan boleh dijalankan dibawah bangunan yang tidak dinyatakan dalam perakuan sijil kelayakan menduduki, boleh atau tidak boleh? He conducts business in the building not covered by the certificate of fitness. Simple question.

Rohaizan: Bagi saya yang dimaksudkan sebuah tadi itusebuah itu adalah merangkumi.

Rishwant: Sorry?

Rohaizan: Sebuah, sebuah itu adalah merangkumi semua yang telah diluluskan di dalam permohonan itu.

Rishwant: Sebuah, sorry?

Rohaizan: Istilah sebuah itu adalah merangkumi kesemua kelulusan yang telah diluluskan pada /1 itu.

(c) in fact, SP2 when asked during re-examination clarified that the workshop was already included in the approved plan which was referred to in the said CF. It can be seen as follows:

Max Yong: Can you confirm that this plan MPM plan 03/07/212/2007/1 whether the workshop that has been describe as. Whether it is included in this plan.

Rohaizan: Ya termasuk.

Max Yong: And that has been approved?

Rohaizan: Ya.

Max Yong: Tuan Rohaizan you were also asked to look at the jenis bangunan description in the jenis bangunan, sorry, I am looking at the plan, tuan Rohaizan you were also asked on the question on the description in the jenis bangunan, bangunan sebuah kilang bangunan steel fabrication serta pejabat

dua tingkat. Now is this description a complete description of one piece on the land as far as the MPM concerned.

Rohaizan: Betul sebab dia menyatakan jenis bangunan so maksudnya disitu terdapat dua kategori yang ada disitu iaitu kilang dan pejabat.

Max Yong: Kilang dan pejabat?

Rohaizan: Ya.

Max Yong: Which is more important encik Rohaizan the description of jenis bangunan or the plan number?

Rohaizan: Nombor pelan.

Max Yong: Plan number?

Rohaizan: Ya.

Max Yong: That is what always refers to ...

Rohaizan: Nombor pelan kelulusan.

(d) SP2 also admitted that there was a mistake in respect of the numbering only in the copy of the plan given to the plaintiff but there was no mistake or error on the CF or in the records of MPM. The following is observed:

Max Yong: Mr Rohaizan can you explain to the court what is confirmed in this letter?

Rohaizan: Dalam surat ini saya mengesahkan bahawa nombor fail sebenar yang diluluskan oleh MPM adalah 07/03/212/2007/1 dan bukannya nombor kelulusan seperti berikut 07/03/212/2007/2. Dan oleh yang demikian saya mengatakan bahawa nombor kelulusan seperti /1 tersebut adalah sah dan tiada sijil gantian bagi perkara tersebut. Tambahan pula dalam surat ini saya menjelaskan bahawa pihak Majlis tiada halangan untuk pihak pemohon menyalin pelan kelulusan tersebut dengan caj yang seperti yang berikut.

Max Yong: Mr Rohaizan in paragraph 2 it is stated you have stated that dimaklumkan terdapat kesilapan nombor fail pada salinan pelan kelulusan pihak tuan, can you elaborate and explain to the court what is the kesilapan that had occurred.

Rohaizan: Ya di sini saya ingin menjelaskan terdapat kesilapan dari segi catatan nombor kelulusan hanya di pelan kelulusan pihak client sahaja. Sedangkan tiga copy yang lain adalah mengikut sepertimana pelan kelulusan yang telah diluluskan iaitu 07/03/212/2007/1. Oleh itu pada surat kami telah menjelaskan bahawa terdapat kesilapan dan kami mengesahkan bahawa kelulusan itu adalah /1 dan bukan /2.

...

Max Yong: You look at perenggan 2. Where you say there is kesilapan. Now

A the kesilapan in respect of the sijil the perakuan kelayakan menduduki or another document?

Rohaizan: Okay saya menjelaskan di sini bahawa kesilapan tersebut adalah kepada nombor pelan kelulusan itu sahaja, pelan kelulusan pihak tuan.

B Max Yong: So the mistake was ...

Rohaizan: Bukan kesilapan daripada CF.

Max Yong: So you confirm that the mistake was in respect of the numbering in the plans given to owner.

C Rohaizan: The client, yes owner.

Max Yong: Is there any mistake in the plans in the MPM file?

Rohaizan: Tiada kesilapan yang berlaku di rekod MPM.

D Max Yong: You were also referred to the sijil perakuan kelayakan untuk menduduki page 1 of bundle C, in looking at this perakuan kelayakan menduduki what is the most important item that has got to be accurate.

Rohaizan: Pada CF ini ia menyatakan ia adalah sijil kelayakan menduduki nombor pelan yang seperti yang berikut /2007 dan /2007/1.

E Max Yong: The plan number as the plan that submitted and approved?

Rohaizan: Betul.

(e) SP2 was firm in his evidence that the CF issued includes the workshop as evident from the approved plan and as notified to the defendant by F way of the said clarification letter;

(f) after the termination of the said contract, SP2 issued another clarification letter dated 24 August 2017 reiterating that there was no need for a replacement CF to be issued since there was no mistake on the G CF. It can be seen as follows:

Max Yong: You mentioned in your letter in the page D, page 4 at the end of paragraph 2 the question that tiada sijil gantian bagi perkara tersebut.

Rohaizan: Page 3?

H Max Yong: Page 4, at the end of paragraph 2 you stated that tiada sijil gantian bagi perkara tersebut. Can you elaborate why did you say that there is no replacement certificate that needed to be issued?

Rohaizan: Bagi maksud tersebut kita dapati bahawa tiada kesilapan berlaku pada sijil CF. oleh yang demikian tiada keperluan untuk sijil itu mendapat I gantian dan kita telah menyemak sijil tersebut ia telah merujuk kepada nombor siri yang telah diluluskan YA iaitu /1. Oleh itu tiada sebarang isu dan sijil itu adalah boleh diguna.

Max Yong: Has Majlis Perbandaran Manjung ever issued any replacement after this CF?

Rohaizan: Tiada.

Max Yong: Mr Rohaizan the CF that has been issued in this case is there any expiry date on the CF?

Rohaizan: Tiada.

Max Yong: Has the CF been cancelled by Majlis?

Rohaizan: Tidak pernah.

(g) there is no reason to suspect the evidence of SP2.

[40] There was also no evidence to suggest any variations or additional buildings erected on the said land other than that which has been approved in the approved plan.

[41] It is therefore my finding based on the above that the CF iscurrent and valid, and its delivery by the plaintiff to the defendant has fulfilled cl 2.1(b) of the said contract.

[42] As for the consent to transfer, I find that it was still valid at the time when it was delivered to the defendant. The consent to transfer had lapsed due to the defendant's own misconceived insistence of a fresh CF despite a clear clarification by MPM to the contrary. The defendant cannot now turn and argue that the said contract is conditional and unenforceable because the consent to transfer has lapsed.

[43] The same position was taken by the Court of Appeal in the case of *MMI Industries*, where Abdul Malik Ishak JCA in delivering the judgment of the court held as follows:

> [51] It must be recalled that the defendant took more than a year to resolve the encroachment issue. *In the intervening period, the State Authority's approval had lapsed and the redemption statement had expired. The cause of all these must be placed on the shoulders, so to speak, of the defendant* because it was the defendant who had required for time to resolve the encroachment issue with Textile.
>
> [52] *It would be wrong to allow the defendant to capitalise on its own breach of contract. The defendant cannot be allowed to argue that the SPA is conditional and unenforceable because the State Authority's approval had lapsed.* And this seems to be the stand adopted by the defendant as evident from the letter emanating from the defendant's solicitors as seen at exh 'P8' of pp 210 to 211 of 'ARJ1'. (Emphasis added.)

[44] As for the defendant's claim that the plaintiff had not complied with cl 2.1 (c) of the said contract for its failure to furnish the original manuals, handbooks, maintenance records and other guides, I agree with the learned counsel for the plaintiff that this issue raised by the defendants waspurely an

afterthought since, prior to the commencement of this action and after the issuance of the plaintiff's solicitors letter dated 23 December 2015 (p 112 Bundle C):

(a) the defendant never raised any complaint or issue regarding the fulfilment of cl 2.1(c) of the said contract; and

(b) the defendant only raised two outstanding issues namely the inaccuracy of the CF and the rectification and reissuance of the CF.

[45] Based on all of the above, I find that on the balance of probabilities, the plaintiff has successfully shown that all of the conditions precedent under cl 2.1 of the said contract has been fulfilled. Therefore, I am of the considered view that the said contract was no longer a conditional contract and had come into full force.

WHETHER THE DEFENDANT WAS ENTITLED TO TERMINATE THE SAID CONTRACT AND WHETHER THE TERMINATION OF THE SAID CONTRACT BY THE DEFENDANT WAS LAWFUL

[46] The next issue is whether the defendant was entitled to terminate the said contract and whether the termination of the said contract by the defendant was lawful.

[47] In the said contract, the circumstances for termination of the contract has been specifically agreed between the parties as per the following:

12. DEFAULT OF PARTIES

12.1 If the Purchaser fails to observe or comply with any of the terms and conditions of this Agreement, the Vendor may at its discretion rescind the Agreement whereupon the Deposit shall be forfeited by the Vendor and thereafter the Vendor may be at liberty to resell the said Property as the Vendor may deem fit.

12.2 In the event that the Vendor shall fail to deliver the Discharge Documents and other relevant documents pertaining to the said Property pursuant to this Agreement or shall be in breach of the terms and conditions of this Agreement, the Purchaser shall be entitled to:-

(a) seek specific performance of this Agreement; or

(b) terminate this Agreement by notice in writing to the Vendor. In such event, the Purchaser shall be entitled to an immediate refund of the Deposit free from interest in exchange for the Purchaser returning or cause to be returned the said Transfer, the Completion Documents, the Discharge Documents and all other relevant documents with the Vendor's rights and interest intact to the Vendor and redelivered to the Vendor vacant possession of the said Property free from any rental or charges.

[48] Another provision for termination is provided under cl 17.3 of the said contract regarding breach of representation and warranties. However, this provision is of no relevance to the present case.

[49] In order to determine whether there was a valid termination, it must firstly be determined whether there was a valid reason for the defendant to terminate the said contract in the first place, based on the express terms of the said contract.

[50] In the recent Court of Appeal case of *Richallenge Corp Sdn Bhd v Poteck Enterprise Sdn Bhd* [2020] 3 MLJ 704; [2020] 5 CLJ 472, Hasnah Mohammed Hashim JCA in delivering the judgment of the court held in no uncertain terms that:

> [34] *Whether there was a valid termination would be based on whether in the first place there was a valid reason to terminate as stipulated by the terms of the agreement*. There must be a proper construction of the terms of the agreement, in this case the SCA. The reasons or grounds for termination are particularised in the agreement and the agreement gives a right of notice to rectify the breach. If no notice is given, the party allegedly in breach would not have any knowledge of the breach complained of and thus unable to take the necessary steps to rectify. Having examined the terms of the SCA in its entirety, we are of the view that in this instant appeal before us, the termination is bad in law. Firstly, termination is not permitted unless as stipulated under cl 10 SCA; that termination can only take place if the main contract was terminated, which was not the case in this instant appeal. Secondly, cl 11.3 SCA is the termination clause but it allows the defendant to appoint another contractor to complete the works only if notice is given to the plaintiff to rectify an identified breach and the plaintiff must rectify that breach within the prescribed time given. If the plaintiff fails to rectify then the defendant can appoint another contractor.
>
> [35] *The defendant had ignored the express contractual term on termination when it decided to terminate the SCA. This court has repeatedly stated that the court cannot rewrite the terms of the contract agreed by the parties. In Attorney General of Belize v Belize Telecom* [2009] UKPC 10, delivering the advice of the Board, Lord Hoffman said:
>
> > The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> [36] Lord Pearson in *Trollope & Colls Ltd v North West Metropolitan Regional*

Hospital Board [1973] 1 WLR 601 remarked:

> ... the court does not make a contract for the parties. The court will not even improve the terms which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been suitable. An unexpressed term can be implied if and only if court finds that the parties must have intended that term to form part of their contract.

[37] As Lord Pearson in *Trollope* said the courts will not even improve the terms which the parties have made themselves, however desirable the improvement may be. In this regard, the learned Judicial Commissioner made findings of fact without taking into consideration the terms of the SCA as agreed to by the parties. We agreed with learned counsel for the plaintiff that cl 11.3 cannot be read independently of cl 10 in order to subvert the true intent of that clause. Based on the terms and conditions of the SCA, the termination by the defendant is wrong in law for non-compliance with cll 10 and 11.3 of the SCA. (Emphasis added.)

[51] As can be seen under cl 12.2 of the said contract, the grounds which will definitely give rise to the defendant's right to terminate the said contract is when the plaintiff fails to deliver the discharge documents and other relevant documents pertaining to the said land pursuant the said contract or if the plaintiff is in breach of the terms and conditions of the said contract.

[52] As discussed earlier, since all of the conditions precedent has been fulfilled, the plaintiff did not commit any breach of the terms of the said contract. Therefore, I am of the considered opinion that there was actually no valid reason which would otherwise justify the termination of the said contract by the defendant. The termination of the said contract by the defendant in the present case was bad in law.

[53] In the circumstances where the said contract has been wrongfully or unlawfully terminated, the plaintiff may elect to either accept the termination and sue for damages or to reject the termination and treat the said contract as subsisting.

[54] In the Court of Appeal case of *LSSC Development Sdn Bhd v Thomas a/l Iruthayam and Anor* [2007] 4 MLJ 1; [2007] 2 CLJ 434, Gopal Sri Ram JCA (as he was then) in delivering the judgment of the court held that:

> The general law is where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at and end and sue for damages. The rationale is that the primary obligation to perform the promise made its substituted with the secondary

> obligation to compensate the promisee for the breach. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting.

[55] In the present case, the plaintiff through its learned solicitors during the course of the trial had informed and submitted that it would not be pursuing itsclaim for specific performance of the said contract. The plaintiff is now seeking for declaratory orders that the plaintiff has fulfilled all the terms under the said contract, and that the defendant had unlawfully terminated the said contract. Based on the above reasoning, the answer is in the affirmative.

WHETHER THE PLAINTIFF IS ENTITLED TO FORFEIT THE DEPOSIT PAID BY THE DEFENDANT

[56] Since it was found that the defendant had unlawfully terminated the said contract, the next issue to be determined is whether the plaintiff is entitled to forfeit the deposit paid by the defendant.

[57] In light of the Federal Court's decision in the case of *Morello Sdn Bhd v Jaques (international) Sdn Bhd* [1995] 1 MLJ 577; [1995] 2 CLJ 23, in order to determine whether a deposit under the said contract is a true deposit, due regard must be given to the terms of the said contract as a whole and the surrounding circumstances. In the exact words of Edgar Joseph Jr FCJ (as he then was) in delivering the majority judgment of the court:

> In considering the question what was expressly stipulated as a deposit in the agreement was a true deposit, we have paid due regard to the terms of the agreement as a whole, and the surrounding circumstances.

[58] The effect of a true deposit regarding its forfeiture, and the test to determine the same has been succinctly expounded by the Court of Appeal in *Invescor Sdn Bhd v Sobena Maju Sdn Bhd* [2007] MLJU 653; [2008] 2 CLJ 561 through the judgment of James Foong JCA (as he then was) who held as follows:

> [123] *Consequently if a deposit is a true deposit, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain. This is so even if the 'vendors' loss is less than the deposit. This is so even if the vendor suffers no loss at all. The test normally accepted to ascertain whether a sum is within the bounds of an earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land.* (See *Sun Properties Sdn Bhd v Happy Shopping Plaza* [1987] 2 CLJ 423; [1987] CLJ Rep 345) ...
>
> ... [152] As manifested in various authorities, the test normally accepted to ascertain whether a sum is within the bounds of as earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land. In short, it's conventionally accepted that a deposit of 10% is a true deposit (See *Sun Properties Sdn Bhd v. Happy Shopping Plaza* [1987] 2 MLJ 711).

A [153] *As case laws in various jurisdictions have shown, a deposit of 10% of the purchase price is quite commonplace and has enjoyed widespread commercial approval and acceptance*.

[154] *So too, in the instant appeal. I am of the view that the respondent is entitled to a forfeiture of 10% of the total consideration of RM15m*, discounting the RM200,000 B already paid. (Emphasis added.)

[59] Turning to the facts in the present case, it can be seen that cl 1.1 of the said contract clearly stipulates that the sum of RM1.7m is clearly a deposit and also part payment of the purchase price of the said land. The deposit sum C constituted 10% of the purchase price of the said land. The deposit has already been paid by the defendant upon execution of the said contract. I find that the amount was reasonable and is common in commercial, business and land transactions.

D **[60]** In short, I am of the view that the plaintiff is entitled to the forfeiture of the deposit amounting to RM1.7m which has already been paid by the defendant in the present case.

E **[61]** On a separate note, regarding the defendant's counterclaim for damages, I am of the considered view that the defendant is not entitled to damages since it was the defendant who had unlawfully terminated the said contract.

F CONCLUSION

[62] In conclusion, based on the foregoing reasons it is hereby ordered as follows.

G **[63]** With regard to the plaintiff's action, prayer 3(a), (b) and (c) under para 24 of the plaintiff's amended statement of claim is allowed with costs of RM25,000 subject to allocator.

[64] For the same reasons enumerated above, the defendant's counterclaim is H dismissed with costs of RM25,000, subject to allocator.

Plaintiff's claim allowed; counterclaim dismissed.

Reported by Ashok Kumar

I